In the Supreme Court of the United States

OCTOBER TERM, 1956
No. 478.

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,

VS.

THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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The appellee, The City of Opelika, Alabama, has filed a motion to dismiss the appeal on the grounds:

(a) that the appeal does not present a substantial federal question, and

(b) that in part the federal questions were not timely or properly raised or passed on by the courts below.

STATEMENT OF THE CASE.

This is a suit brought against the appellee, The City of Opelika, Alabama, to recover monies paid to the City pursuant to a flat sum licence tax on the ground that the ordinance imposing the tax violates the Federal Constitution. Appellant, The West Point Wholesale Grocery Company, is a Georgia corporation whose activities are wholly interstate in character. (For a more complete statement of the case please see the Jurisdictional Statement, page 5.)

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

Appellee bases its attack on the ground that this Court has in the case of *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33 (1940), conclusively decided that an annual flat sum licence tax levied upon persons engaged in interstate commerce does not violate the Federal Constitution.

The tax in the *Berwind-White* case was of equal application to all sales in New York City whether the goods had been transported in interstate commerce or not.

The licence tax in the instant case is applicable only to those who transport goods from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama. The tax on local wholesale grocers is graduated according to gross receipts derived from such local business.

In *Nippert v. City of Richmond*, 327 U. S. 416 (1946), a case involving a flat sum licence tax levied upon the solicitation of business in interstate commerce, this Court repudiated a similar attempt to apply the *Berwind-White* case when it said (at p. 423):

> "Appellee's rationalization [delivery separate and distinct from interstate commerce] takes only partial account of the reasoning and policy underlying the *Berwind-White* decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation, and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult

> to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result." (Bracketed matter supplied.)

It is quite obvious that the *Berwind-White* case involving a *non-discriminatory* tax on *all sales* does not support the validity of a flat sum licence tax upon interstate commerce. That case has no application whatsoever to this case, involving a *discriminatory flat sum* licence tax on *non-local* wholesale grocers.

THE FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED AND EXPRESSLY PASSED UPON BY THE COURT BELOW.

In essence this aspect of appellee's argument is based upon the contention that the case below was decided upon questions of local practice and pleading.

In the face of the opinion delivered by the court from which this appeal is taken, such a contention is without merit. The Alabama Court of Appeals stated (Jurisdictional Statement 22):

> "The legality of the tax provided for under quoted Section 130(a) of the ordinance is challenged on the ground (1) that it imposes an undue burden on interstate commerce in violation of Article 1, Section 8, Clause 3 of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in

that it differentiates between interstate and intrastate commerce; differentiates between interstate merchants properly in the same class as appellant, because that said classification 130(a) fixes a license fee of $250.00 while classification 130 fixes a fee of $100.00; a flat sum license tax is levied without regard to the amount of business each year; discriminates between itinerant wholesale grocery merchants and local wholesale merchants in that the local merchants are taxed on a graduated gross receipts basis while itinerant wholesale grocers are required to pay a flat-sum license."

In the next six paragraphs of its opinion the state appellate court disposed of, on federal grounds, to its own satisfaction, the Federal Constitutional questions raised by the demurrer. In these six paragraphs the court found that:

1. The ordinance is essentially identical with those previously considered and held valid.

2. The ordinance applies to the delivery of wholesale groceries within Opelika regardless of whether transportation began from within or without the state. (But the state court failed to note that the ordinance did not apply to local, Opelika merchants.)

3. The basis of classification is reasonable.

4. The tax is not discriminatory because local wholesalers are taxed on a graduated scale gross receipts tax.

5. Flat sum license taxes do not necessarily discriminate against interstate commerce.

6. The complaint does not support the charge of unlawful discrimination or show that the tax is an undue burden on interstate commerce.

Thus, the state court expressly recognized the federal questions and expressly sustained the demurrant on federal grounds. Appellee's contention that the federal questions were not properly or timely raised fly in the face of the state court's explicit statements.

In *Charlestown Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 (1945), this Court made it clear that where a state court of last resort decides a federal question the United States Supreme Court has jurisdiction to review, when it said (at 185-6):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of validity, we have jurisdiction on appeal. For we need not inquire how and when the question of validity of the statute was raised when such question appears to have been actually considered and decided by that court."

The rule stated in the *Charlestown* case is applicable even where the federal question; though not raised or passed upon in the trial court, was passed upon in the state appellate court. *Home Ins. Co. v. Dick*, 281 U. S. 397, 407 (1930); *Saltonstall v. Saltonstall*, 276 U. S. 260, 267 (1928); *Chicago, Rock Island & Pacific Ry. v. Perry*, 259 U. S. 548, 551 (1922).

While it is clear that under any possible view the court below passed upon the federal questions, the determination of whether a federal question is properly before this Court is for this and no other court to decide. As was said in *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341, 346 (1926):

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a

law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

In the more recent case of *Brown v. Western Railway of Alabama*, 338 U. S. 294, 296 (1949), this Court reaffirmed that doctrine. A different rule would permit the evasion of a decision on federal grounds in the name of local practice. This is not permitted. *Davis v. Wechleser*, 263 U. S. 22, 24 (1923); *Covington & Lexington Turnpike Road Co. v. Samford*, 164 U. S. 578, 595-6 (1896); *Carter v. Texas*, 177 U. S. 442, 447 (1900), *Boyd v. Thayer*, 143 U. S. 135, 180 (1892); *Mitchell v. Clark*, 110 U. S. 633, 645 (1884).

CONCLUSION.

Appellant respectfully suggests that the federal questions are substantial, that the federal questions were properly and timely raised in the Court of Appeals.

Appellant respectfully requests that the Motion to Dismiss be overruled in all respects.

Respectfully submitted,

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